



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 210 OF 2010

**UNIVERSAL EDUCATION TRUST FUND.....PLAINTIFF**

**VERSUS**

**MONICA CHOPETA.....DEFENDANT**

**RULING**

The plaintiff's application dated 31<sup>st</sup> August 2010 is for summary judgment to be entered in its favour against the defendant for

- ***Ksh. 280,000***
- ***Vacant possession of the house No. 11 on plot No. M.N. /11269-1271-1272.***
- ***Mesne profit of Kshs. 10,000 per month from 1<sup>st</sup> July 2010 until payment in full.***

The plaintiff pleaded in its plaint that it is the registered owner of Plot No. M.N. /11269-1271-1272 whereupon it has erected houses. The defendant who was the plaintiff's former employee is a tenant at house No. 11 on that land, on a month to month tenancy, at the rental of Ksh. 10,000 per month. The lease agreement between the parties provided the defendant with an option to purchase the house after 5 years whereon if the option was exercised, the rental paid upto date was to be calculated as part of the purchase price. The defendant's employment with the plaintiff was terminated before the lapse of the 5 years.

The plaintiff in its plaint pleaded that the defendant had persistently defaulted in payment of rent and that by 30<sup>th</sup> June 2010 the defendant owed Ksh. 280,000 as rent arrears. The plaintiff therefore sought judgment for that amount and for vacant possession of House No. 11. The defendant filed a defence and counterclaim whereby she denied the plaintiff's claim and sought for orders for specific performance that is the plaintiff be ordered to transfer the house into her name. The defendant pleaded that the plaintiff made oral representation that the property would be vested in the defendant's name upon payment of the amount stated in the agreement. That as a result of those representations the defendant carried out extensive repair to the property with the full knowledge of the plaintiff. The defendant pleaded that she is ready to pay the amount due and therefore prayed that the property be transferred into her name.

The plaintiff relied on the case **QUANTUM PETROLEUM LTD VS SOVEREIGN OIL LTD HCCC 64 OF 2010** in support of the application for summary judgment. The high Court in that case considered some of the court of appeals decisions where the court of appeal discussed what ought to be considered in

an application for summary judgment. The court in that case relied on the following cases:

***“In Gohil –v- Wanai [1983] KLR 489, the Court of Appeal held, inter alia, as follows:-***

***“The Civil Procedure Rules Order XXXV Rule 2(1) requires the defendant to show either by affidavit or by oral evidence that he should have leave to defend. The burden is on the defendant to satisfy the court that he is entitled to leave to defend the suit. Leave to defend will not be granted if he merely states that he has a good defence on merit, he must go further and show that the defence is genuine or arguable or raises triable issues.”***

***The defendant’s duty is therefore to demonstrate the existence of bona fide triable issues or that he has an arguable case. As a corollary, a plaintiff who is able to demonstrate that a defence made by the defendant in an action falling within the purview of Order XXXV (now order 36 of the Civil Procedure Rules 2010) is a sham, is entitled to summary judgment. (See Nairobi Golf Hotels (Kenya) Ltd –v- Lalji Bhimji Sanghani Builders & Contractors [Civil Appeal No. 5 of 1997](UR). Giciem Construction Co. –v- Amalgamated Trade Services [1983] KLR 156 the Court of Appeal held, inter alia, as follows:-***

***“the object of Order XXXV of the Civil Procedure Rules is to enable a plaintiff with a liquidated claim in which the defendant has no reasonable defence to a quick judgment without being subjected to a lengthy unnecessary trial.”***

See also **Zola –v- Ralli Brother [1969] E.A 691.**

The defendant opposed the application along the same lines that she had pleaded in her defence and counter claim. She opposed it on the basis that there were serious issues that ought to go for trial; that she entered into the agreement with the plaintiff with a clear understanding that she could carry out renovation to the house; that the plaintiff had refused to accept rent from the defendant and that the plaintiff had failed to prove its claim.

The lease agreement between the plaintiff and the defendant is dated 30<sup>th</sup> April 2003. In that agreement, the defendant is stated to be the plaintiff’s employee. The defendant by that agreement obtained a lease of the plaintiff’s house being house No. 11, for 5 years. Thereafter, if the defendant remained in the plaintiff’s employment the house would be offered to her for sale at the price of Ksh. 2,677,594. The monthly rental for that house was agreed at Ksh. 10,000 per month. The lease agreement provided that after 5 years the rental paid by the defendant would be considered as part payment of the purchase price provided that the defendant was still in the plaintiff’s employment. Some of the pertinent clauses of the lease agreement are as follows:

***“(a) The employee (the defendant) has agreed that the monthly deductions shall be taken as rent if he/she leaves employment before 5years and no claims for refund shall be entertained.***

***(b) The employee has agreed that should he/she leave employment of the TAL group of Companies (the plaintiff) after a period of 5 years when the option of purchase will have taken effect, he/she shall be required to pay the outstanding principal balance of the purchase price within a period of 90 days.”***

There is a clause in the lease agreement which provided for the termination of the agreement if the defendant failed to pay the rental as per the agreement. It is important to note that the agreement specifically excluded any other agreement other than the written agreement. In other words, the agreement excluded any other agreement or understanding which would amend or waive any right or obligation in the written agreement. It is important to consider that clause. It is as follows:

***“ENTIRE AGREEMENT: This Agreement, constitutes the full and entire understanding and agreement between the parties hereto with regard to the subject matter hereof. Neither this Agreement nor any term hereof may be amended, waived, discharged, or terminated other than by a written instrument signed by the party against whom enforcement of any such amendment, waiver, discharge, or termination is sought. No waiver of any provisions of this Agreement shall be effective unless in***

**writing and the waiver of any one provision shall not be deemed a waiver of any other provision unless expressly stated in writing. All rights and remedies of the Fund described herein shall be cumulative and not restrictive of any other rights or remedies available under any other document or instrument, at law or in equity.”**

The defendant did not specifically deny owing the plaintiff the amount claimed as rent arrears or the mesne profits. The defendant's response to that claim was that the plaintiff had refused to accept her rental payment. The defendant did not prove she had offered the rent and it had been refused. Even after the plaintiff's demand letter dated 29<sup>th</sup> February, 2008 which letter demanded that the defendant would pay rent arrears of Kshs. 100,000, the defendant did not show her response to the same. She did not write stating that the arrears had accumulated because the plaintiff had refused to accept the rent. The court therefore finds that the defendant does owe the plaintiff the rental claimed plus mesne profits. The lease agreement specifically provided for termination of the lease, cum sale agreement, when there was breach. The defendant failing to pay rent when it was due, that was breach of the agreement. I reject the defendant's attempt to rely on rent receipts attached to her replying affidavit as proof that she was not indebted to the plaintiff. Not only do those receipts refer to a person other than the defendant, they also seem to relate to rental due for months previous to when the payment was made.

Is the defendant entitled to her claim in the counter claim where she seeks for the court to order the plaintiff to transfer the house to her? The defendant's employment with the plaintiff ended on 6<sup>th</sup> December 2005. The defendant having entered into the plaintiff's employment in the year 2003 had not completed 5 years in that employment. According to the agreement the defendant could not benefit from the clause reproduced above which entitled her to purchase the house after 5 years in employment. The defendant has attempted to rely on alleged representations made to her with a view to seeking orders for transfer of the house in her name. As shown above, the agreement itself forbade such reliance. It is also clear that the defendant cannot seek to present extrinsic evidence when her relationship with the plaintiff is already spelt out in the written agreement. In the book by Treitel entitled '*The law of contract*' the learned author discussed parol evidence rule as follows:

***“The parol evidence rule states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, i.e on evidence not contained in the document. Although the rule is generally stated as applying to parol evidence, it applies just as much to other forms of extrinsic evidence. Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents.”***

The defendant is forbidden by that rule from introducing, as she does in her defence and counter claim, verbal representation to alter written agreement. This was also the holding in the case MUTHURI VS NATIONAL INDUSTRIAL CREDIT BANK LTD [2003] KLR 145 where the court held as follows:

***“1. The history preceding the execution of a contract and any discussions or assurances in that regard are superseded by the subsequent written contract which becomes the exclusive memorial of the parties agreement.***

***2. No extrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of the document.”***

I make a finding therefore that the plaintiff has proved that the defendant breached a term of the written agreement and because of that breach the plaintiff is entitled to terminate the lease agreement and consequently is entitled to vacant possession of the house. The plaintiff has also by exhibit marked as 'AHY4' annexed to the plaintiff's supporting affidavit shown that the defendant was in rent arrears as at February 2010 of Ksh. 240,000. It follows that by the time this suit was filed that is June 2010 four months later, the arrears were Ksh. 280,000. That is the amount claimed in this suit. The defendant did not show a bona fide issue which can go for trial. It is for that reason that I enter summary judgment for

the plaintiff as follows:

- 1. The defendant shall within 30 days from this date hereof give the plaintiff vacant possession of house no. 11 on plot M.N. /11269-1271-1272 in default an eviction order shall issue.**
- 2. Judgment is entered for the plaintiff for Ksh. 280,000 plus mesne profits of Ksh. 10,000 per month from 1<sup>st</sup> July 2010 until the defendant grants vacant possession to the plaintiff of house No. 11 on plot M.N. /11269-1271-1272.**
- 3. The plaintiff is awarded interest at court rate from the date of filing suit on the amount of Ksh. 280,000 and the mesne profits as per No. 2 above.**
- 4. The plaintiff is awarded costs of the Notice of motion dated 31<sup>st</sup> August 2010 and costs of this suit.**

**DATED and DELIVERED at MOMBASA this 15<sup>th</sup> day of March, 2012.**

**MARY KASANGO**

**JUDGE**